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## BEYOND THE DESIRE FOR LAW: SEX AND CRISIS IN AUSTRALIAN FEMINIST AND QUEER POLITICS

*Mark Pendleton and Tanya Serisier\**

On 22 May 2008, police raided the Roslyn Oxley9 art gallery in Sydney. A number of photographic works by renowned Australian photographer Bill Henson were removed on what was to be the opening night of his latest exhibition. The works featured photographs of partially naked adolescent youths, with an image of a shirtless 13 year old girl causing the most controversy. Police also announced that they intended to prosecute both Henson and the gallery with 'publishing an indecent article', an offence under both the Commonwealth and NSW Crimes Act.<sup>1</sup> While charges were never laid, the event was highly controversial, generating comments by the new Prime Minister, Kevin Rudd, and leading to a fissure between Rudd and the representatives of Australian arts and culture gathered in the 'Creative Australia' stream of the Prime Minister's 2020 Summit, which had occurred just a short time previously. Numerous opinion pieces and articles appeared in both the broadsheet and tabloid newspapers, and later that year David Marr published a book about the event and the surrounding controversy.<sup>2</sup>

In many ways, the Henson case was significant for its timing. The election of the Kevin Rudd-led Labor Party to federal government in 2007 signalled the demise of a decade of conservative rule. John Howard's Coalition Government was known not only for economic rationalism but also for its social and cultural conservatism, marked particularly by a strident anti-feminism, and a discomfort with non-normative sexualities. During the Howard era, significant reversals occurred to earlier progressive reforms, and what were perceived as traditional means of structuring families and relationships were bolstered. Examples include changes to parental custodial arrangements, de-funding of womens' organisations, denial of access to assisted reproductive technology to lesbians and single women, the stalling of further reforms to equalise same-sex relationships on a federal level (beyond the Keating government's immigration

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Both Tanya and Mark have also been active in a range of left campaigns and collectives around issues of gender and sexuality.

<sup>1</sup> Kennedy Les 'Henson Show Charges' *The Sydney Morning Herald* 23 May 2008 p 1.

<sup>2</sup> Marr David *The Henson Case* Text Publishing Melbourne 2008.

reforms), and the introduction of the baby bonus.<sup>3</sup> Whether it was a defence of the rights of fathers in the face of the excesses of feminism, or protecting the institution of marriage from its contamination by same-sex couples, the Howard government overwhelmingly portrayed its actions as a defensive response to crisis.

In relation to gender and sexuality, the new Rudd government was symbolically very different. As Deputy Prime Minister, Julia Gillard is the most powerful woman ever in an Australian government. Media revelations of Climate Change Minister Penny Wong's same-sex partner not only failed to become an issue, but make her the most prominent openly lesbian or gay politician in the country, as well as being one of the most senior members of the Rudd government. Politically, the new government sought to represent itself as signalling the re-emergence of a more progressive social and cultural politics, and indeed invested a great deal of resources into this image. The *2020 Summit* itself, 'aimed at harnessing the best ideas for building a modern Australia ready for the challenges of the 21<sup>st</sup> century,' exemplified the new government's claims to be both progressive and dynamic.<sup>4</sup> In short, the Government went to some effort to present itself as embodying a different and less defensive cultural politics to its predecessor. Given all this, there was some expectation that the Rudd government would substantially differ from the Howard government's approach to social issues.

However, the Henson debate revealed that the discourse of crisis surrounding sex is not an issue that can be easily split along traditional lines of conservatives and progressives. Rather, Kevin Rudd's support for the removal of Henson's photographs, and his claim to find them 'absolutely revolting' partook of a similar logic of defensive anxiety to that which characterised the Howard government's response to such issues.<sup>5</sup> This anxiety could be seen even more clearly in June 2008 when the Senate Standing Committee on Environment, Communication and the Arts released its report into 'The Sexualisation of Children in the Contemporary Media'. The report stated that the Committee considered 'that the inappropriate sexualisation of children in Australia is of increasing concern'.<sup>6</sup> This narrative of an accelerating crisis around sexuality, with children as its symbolic victims, could also be seen in other areas of government. For instance, when Minister for Communications Stephen Conroy announced plans to introduce mandatory filtering of Internet content, his rationale was based on the protection of children, saying, 'Although the internet has opened up a world of possibilities and benefits for Australian children

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<sup>3</sup> Numerous discussions of the changing social politics of Australia appeared during and in the immediate aftermath of the Howard years which focussed on social and cultural policy, with a particular focus on gender and sexuality. Some examples include Maddox Marion *God Under Howard: the rise of the religious right in Australian Politics* Allen & Unwin Sydney 2005; Chappell Louise 'Winding Back Australian Women's Rights: Conventions, Contradictions and Conflicts' (2002) 37 3 *Australian Journal of Political Science* 475; Summers Anne *The End of Equality: Work, Babies and Women's Choices in 21st Century Australia* Random House Australia Milsons Point 2003; Johnson Carol 'The Howard Government: gays, lesbians and homophobia' (2002) 3 *Word is Out* 1; Ryan, Neal 'A Decade of Social Policy under John Howard: Social Policy in Australia' (2005) 33 3 *Policy and Politics* 451; Sawer Marian 'Disappearing Tricks' in (2008) 27: 3 *Dialogue* 4–9.

<sup>4</sup> Australian Government 'Australia 2020' [www.australia2020.gov.au](http://www.australia2020.gov.au) accessed on 10 November 2009.

<sup>5</sup> 'Rudd Revolted' *Sydney Morning Herald*, 23 May 2008, <http://www.smh.com.au/news/arts/nude-photographs-revolting-rudd/2008/05/23/1211183044543.html> accessed on 10 November 2009.

<sup>6</sup> Communication and the Arts Standing Committee on Environment *Sexualisation of Children in the Contemporary Media* Australian Senate Canberra 2008.

it has also exposed them to continually emerging and evolving dangers that did not previously exist'.<sup>7</sup>

In this article, we argue that the narrative of 'crisis' and 'danger' in terms of sex is one of the overlapping features of both the Howard and Rudd governments, and that it echoes a wider context of cultural anxiety around sex, and the sexualisation of crises more generally.<sup>8</sup> It is echoed in an influx of publications in recent years which similarly portray sex and sexuality as crisis-ridden. What is noteworthy in many of these publications is the prominence of traditionally radical feminist arguments, and their acceptance by both progressive and conservative commentators.

The most notable example of this is Ariel Levy's bestselling 2005 book, *Female Chauvinist Pigs: Women and the Rise of Raunch Culture*, which led conservatives and progressives alike to devote inches of broadsheet column space to the crisis represented by 'raunch culture'.<sup>9</sup> The book drew explicitly upon radical feminist figures such as Susan Brownmiller and Catherine MacKinnon to claim that women and girls are being victimised by an 'over-sexualised' society.<sup>10</sup> Subsequent to Levy's book, the Australia Institute, a 'think-tank' associated with the progressive side of Australian politics, has published several reports on 'corporate paedophilia', linking concerns about 'raunch culture' with the ongoing progressive concern with the power and influence of corporations.<sup>11</sup> Additionally, 2009 has seen the publication of *Getting Real: Challenging the*

<sup>7</sup> Marshall Tim 'Budget provides policing for internet safety', Media Release from the office of Senator the Hon Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, 13 May 2008, [http://www.minister.dbcde.gov.au/media/media\\_releases/2008/033](http://www.minister.dbcde.gov.au/media/media_releases/2008/033) accessed on 10 November 2009.

<sup>8</sup> Although it is outside the scope of this article, it is worth noting that perhaps the major emergency of our time, the war on terror and the 'clash of cultures' between the 'West' and 'Islam', has in many ways been played out through discourses of gender and sexuality. An Australian example can be seen in debates around the wearing of the hijab. Ho Christina and Dreher Tanja (eds) "'Not Another Hijab Row": new conversations on gender, race and religion' (2007) 2.1 *Transforming Cultures eJournal* <http://epress.lib.uts.edu.au/journals/TfC> accessed on 3 September 2009. This discourse of sexualised crisis could also be seen in the so-called epidemic of Muslim gang rapes in Sydney in 2000. Poynting Scott Noble Greg Tabar Paul and Collins Jock *Bin Laden in the Suburbs: Criminalising the Arab Other* Sydney Institute of Criminology Sydney 2004 p 116–152; Serisier Tanya 'The Bankstown Gang Rapes: Rape and the Construction of a Horrific Event' (2006) 16 *AntiTHESES* 74–89. Similarly, the 2007 publication of the 'Little Children Are Sacred' Report, commissioned by the Northern Territory Government into child sexual abuse in remote Indigenous communities and the Howard and Rudd governments' 'interventions' into those communities also reflect an important intersection between narratives of crisis around sex and unresolved national cultures of racism and dispossession. This intersection has been discussed by a range of authors in academic and popular literature. See for example, Maddison Sarah 'Indigenous autonomy matters: what's wrong with the Australian government's "intervention" in Aboriginal communities' in (2008) 14 :1 *Australian Journal of Human Rights* 41–61; Altman Jon and Hinkson Melinda (eds) *Coercive Reconciliation: stabilise, normalise, exit Aboriginal Australia* Melbourne: Arena Publications 2007; Toohey Paul 'Last Drinks: the impact of the Northern Territory intervention' (2008) 30 *Quarterly Essay*.

<sup>9</sup> Levy Ariel *Female Chauvinist Pigs: Women and the Rise of Raunch Culture* Schwartz Publishing Melbourne 2005. For some examples of discussions, see Devine Miranda 'It's a Culture Guaranteed to Cause a Clash' *Sydney Morning Herald* 7 September 2006 13; Webb Carolyn 'Sexual Devolution' *The Age* 24 October 2005 14.

<sup>10</sup> Levy as above at 60 and 63–64 respectively.

<sup>11</sup> Rush Emma and La Nauze Andrea *Corporate Paedophilia: Sexualisation of Children in Australia* The Australia Institute Discussion Paper 90 2006; Rush Emma and La Nauze Andrea *Letting Children Be Children: Stopping the Sexualisation of Children in Australia* The Australia Institute Discussion Paper 93 2006.

*Sexualisation of Girls*, published by feminist publishing house, Spinifex Press, and edited by Melinda Tankard Reist, a 'pro-life feminist' long associated with conservative social politics for her anti-abortion activism.<sup>12</sup> This collection included contributions by well-known Australian leftists such as Clive Hamilton, the founder of the Australia Institute. Following Levy, the blame is generally laid at the feet of 'raunch culture', a phrase that has come to imply that any public representation of sexuality, whether Paris Hilton's sex videos or Bill Henson's nude photographs, is a product of, and furthers, the negative sexualisation of public life.<sup>13</sup> Hamilton's essay, 'Good is the New Bad: Rethinking Sexual Freedom' encapsulates this tendency, with its call from a progressive perspective for a rethinking of the goals of feminist and queer struggles around sex.<sup>14</sup> Hamilton has argued elsewhere that these ideas have 'become a reactionary force, for they have substituted an uncritical defence of the freedoms won in an earlier era for a real politics of social change'.<sup>15</sup>

We argue that there is an underlying discursive framework that unites these examples. It is one in which sex itself is framed as both in crisis *and* as constituting a crisis within wider society. It cannot be dismissed as conservative as it draws upon the discourses of feminist and queer politics and activism around sex and sexuality to legitimate its claims and concerns.<sup>16</sup> Indeed, these contemporary crises are only thinkable within the context of the historical impacts of queer and feminist social movements. They point in important ways to the successes of these discourses

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The Australia Institute describes its purpose as to 'help create a vision of a more just, sustainable and peaceful Australian society and to develop and promote that vision in a pragmatic and effective way.' It was established in 1994 and is associated with the progressive side of Australian politics, with its current directors having political ties to the Australian Labor Party, the Australian Greens, and the Australian Democrats. Information about the Australia Institute can be found at [www.tai.org.au](http://www.tai.org.au).

This linkage is also present in Levy's book and has been a longstanding critique of radical feminists. See for example Jeffreys Sheila *Beauty and Misogyny: Harmful Cultural Practices in the West* Routledge London and New York 2005.

<sup>12</sup> Tankard Reist Melinda (ed) *Getting Real: Challenging the Sexualisation of Girls* Spinifex Press Melbourne 2009.

Melinda Tankard Reist's best-known previous book is a collection of first-person accounts of women who regret their decisions to have an abortion. Tankard Reist Melinda *Giving Sorrow Words: Women's Stories of Grief After Abortion* Duffy & Snellgrove Sydney 2000.

<sup>13</sup> This is by no means an exhaustive list of publications in Australia concerned with 'raunch culture'. A number of magazine articles, newspaper columns and other publications have also been authored. See, for example, Maguire Emily *Princesses and Pornstars: Sex, Power, Identity* Penguin Books Melbourne 2008.

<sup>14</sup> Hamilton Clive 'Good is the New Bad: Rethinking Sexual Freedom' in Tankard Reist Melinda (ed) *Getting Real: Challenging the Sexualisation of Girls* Spinifex Press Melbourne 2009 available at [http://www.clivehamilton.net.au/cms/media/rethinking\\_sexual\\_freedom.pdf](http://www.clivehamilton.net.au/cms/media/rethinking_sexual_freedom.pdf) accessed on 13 September 2009.

<sup>15</sup> Hamilton Clive *Can Porn Set Us Free?* Speech to the Sydney Writers' Festival Sydney 25 May 2003 p 1 available at [http://www.clivehamilton.net.au/cms/media/documents/articles/Can\\_Porn\\_Set\\_Us\\_Free.pdf](http://www.clivehamilton.net.au/cms/media/documents/articles/Can_Porn_Set_Us_Free.pdf) accessed on 6 September 2009.

<sup>16</sup> The use of terminology in discussion of LGBT or queer movements is difficult, as the divisions are both political and historical. Each of these terminologies represents a particular politics in relation to identity and each has its critics. However, in contemporary common usage the terms tend to be relatively interchangeable, and the debates involving them are not our primary concern here. We are more interested in their commonality as referring to political movements and communities centred upon non-normative and non-heterosexual sexual identities and behaviours. As such we use whichever seems most appropriate to a particular example. For one take on the changing politics of terminology in Australia, see Reynolds Robert *From Camp to Queer: Remaking the Australian Homosexual* Melbourne University Press Melbourne 2002.

in restructuring the ways in which sex is thought of and understood in society. In particular, they owe much to the feminist exposure and denaturalisation of the endemic and highly gendered nature of sexual violence, and the feminist and queer challenging of the idea that sex and sexuality constitute 'private' realms, separate from the public domain of politics and governance. However, while we agree with Hamilton that there is a problem with an uncritical defence of freedoms won and a lack of a real politics of social change, we differ in our conclusions as to the underlying causes of our contemporary political situation and in how to respond to this situation.

This article is therefore not about the Henson case as such, although it provides the immediate impetus for our discussion. Our argument is that the case is not significant for its uniqueness, but rather that it is symptomatic of a discourse of crisis that surrounds issues of sex and gender in the Australian public sphere. Our argument in the remainder of this paper is that this discourse of crisis is linked to a politics of regulation and normalisation that threatens any radical or even progressive politics around sex and gender. We are interested especially in how feminist and queer politics are situated in relation to this discourse, and in the possibilities for a political response that goes beyond the current dynamic of crisis and normalisation. Our conclusions are based on examining the implications of this discourse of crisis for contemporary queer and feminist politics.

This article explores this discursive framework of 'crisis' through an historically-informed queer and feminist lens. In doing so we acknowledge the significance of feminist struggles against sexual assault and — along with gay, lesbian and queer activists — the ways in which discussion of sex, gender and violence was forced by these struggles into the public sphere, in effect initiating a 'crisis' in normative sexuality. However, in highlighting an historical shift in how feminism and queer politics interacts with the state and with law, we ask the related questions: 'What has become of a radical politics of sexuality?' and 'Why has the meaning of crisis shifted?' Specifically, we point to the decline in both feminism and queer politics of the utopian ideal of sexual liberation, the concomitant rise in community (and activist) reliance on the law and the state to regulate, control and delimit acceptable sexuality, and the construction of sex itself as a crisis in need of such legal and state intervention. Our primary interest is therefore in how narratives of crisis shifted within queer and feminist movements from a desire to initiate a social crisis within normative sexuality to one in which sexuality must be protected from being brought into crisis.

While our analysis is focused on Australia, we draw on material from elsewhere, most particularly the United States. We are cognizant of the important distinctions between Australia and other nations, particularly in relation to issues of reform and relationships to the State. However, we are also aware of the significance of parallels and mutual political and social influence. This is both because nations such as Australia and the US exist within what Goldie Osuri and Subhabrata Bobby Bannerjee have labelled the 'diaspora of whiteness', and because political developments in the politics of sex tend to resonate between these nations.<sup>17</sup> This resonance can be seen in the international spread of the women's refuge movement or AIDS

<sup>17</sup> Osuri Goldie and Bannerjee Subhabrata Bobby 'White Diasporas: Media Representations of September 11 and the Unbearable Whiteness of Being in Australia' (2004) 14: 2 *Social Semiotics* 151–171.

activism (despite local variation) or, in more recent times, the rhetorical similarities between national campaigns for same sex marriage rights.

## 1.0 SEX AND THE STATE

The prominent position that sex and sexuality now occupy in public politics is, in many ways, a legacy of second-wave feminist arguments that the personal is political and feminist and queer attempts to enact that maxim politically. Queer and feminist relations to the law have always been complex interweavings of desires for protection from harm, desires for recognition and desires for liberation from control. In Australia, these interwoven desires have been further complicated by relations to a state that has over the last few decades been more or less willing to respond to reformist demands of these movements, while co-opting their leaderships into positions of administration, advice and management.<sup>18</sup>

From the 1980s onwards, feminist and gay movements have increasingly turned to the state in order to grant rights, such as relationship recognition, or offer protection, in cases such as sexual violence and anti-discrimination. Wendy Brown has argued in her book *States of Injury* that this is a feature of the contemporary history of progressive politics more broadly:

Western leftists have largely forsaken analyses of the liberal state and capitalism as sites of *domination* and have focused instead on their implication in political and economic *inequalities*. At the same time, progressives have implicitly assumed the relatively unproblematic instrumental value of the state and capitalism in redressing such inequalities.<sup>19</sup>

For Brown this process of abandoning the state and capitalism as sites of critique (and as limitations to be liberated from) is closely linked to an attachment to the self as a wounded subject, calling on the state to both redress the subject's injuries and protect the subject from future harm. In this way, politics is no longer a collective or even individual expression of desire for a different and better future but becomes a moralistic appeal to existing power structures, based on *ressentiment* and codified powerlessness.<sup>20</sup> In the case of queer and feminist movements

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<sup>18</sup> Accounts of these processes can be found in a number of places, including Kaplan Gisele *The Meagre Harvest: The Australian Women's Movement 1950s–1990s* Allen & Unwin Sydney 1996; and Woolcock Geoffrey and Dennis Altman 'The Largest Street Party in the World: The Gay and Lesbian Movement in Australia' in Adam Barry D Duyvendak Jan Willem and Krouwel André (eds) *The Global Emergence of Gay and Lesbian Politics: National Imprints of a Worldwide Movement* Temple University Press Philadelphia 1999 326–343.

<sup>19</sup> Brown *Wendy States of Injury: Power and Freedom in Late Modernity* Princeton University Press Princeton 1995 at 10.

<sup>20</sup> As above at 26. Brown employs the Nietzschean concept of *ressentiment* in explaining the tension at the heart of liberalism. *Ressentiment*, for Nietzsche, is hostility against what is perceived as the cause of a subject's frustration, or what Brown terms the 'moralizing revenge of the powerless'. (As above at 66). This connection between frustration, hostility and morality marks it as unique from a simple anger or resentment. In liberalism, Brown identifies an incitement to *ressentiment*, inherited as two related paradoxes — 'that between individual liberty and social egalitarianism, a paradox which produces failure turned to recrimination by the subordinated, and guilt turned to resentment by the "successful"; and that between

in Australia, however, it has also been the result of significant success in achieving legislative and other reforms.<sup>21</sup> However, feminist and gay movements have their own particular histories that have led them in this direction. For both of these movements, the relationship to the state, and to reform, has been shaped both by the particular history of Australian government, and a more broadly shared political trajectory with social movements internationally.

The election of the Whitlam Labor Party in 1972 provided the Australian feminist movement with a left-liberal government that was sympathetic to at least some of its objectives. The early 1970s therefore saw the emergence of an Australian state willing to engage with feminists and feminism, resulting in the particularly Australian phenomena commonly known as 'femocrats'.<sup>22</sup> This engagement continued through the 1980s and into the 1990s, making the history of Australian feminism quite unique in comparison with the United States. As Ann Genovese writes:

It was this convergence — of the aims of a social liberal state and of feminism — rather than US ideas of neo liberal market and feminism — that enabled a modicum of cooperation between law, state and women's political agendas ... we have to remember our story is different from that of the US; that this was not a story of being shut out, of having to rely on stricter formulations of sameness feminism, or using the 14th Amendment to affect rights based gains through the courts.<sup>23</sup>

In this way, Australian feminists have arguably had a far more empowered interaction with the state than that of the victimised and wounded subject described by Brown. If anything, this has, however meant that the state has been focused on less as a site of domination than the situation that Brown describes. The reform-focused agenda has led Australian feminists to make many compromises with 'institutions that had been designed to exclude them'.<sup>24</sup> The successes of Australian feminists in making achievements through state-based reforms are however, inarguable, and for many feminists, such as Genovese, more than justify the necessary sacrifice of

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the individualism that legitimates liberalism and the cultural homogeneity required by its commitment to political universality'. (As above at 67).

<sup>21</sup> The process of enacting anti-discrimination legislation began in 1975 with the federal Racial Discrimination Act. This process continued with the first state anti-discrimination legislation enacted in New South Wales in 1977, and the passage of the federal *Sex Discrimination Act* in 1984. Contemporary anti-discrimination law in all federal, state and territory jurisdictions includes some provisions related to biological sex, gender expression and sexuality, sexual orientation, sexual preference or lawful sexual activity, although the specifics vary. Although the work to transform anti-discrimination law to address sexuality began much earlier, most progress was made in the 1990s, with some jurisdictions amending their laws in the first decade of the twenty-first century. Ongoing reform efforts also continue. Useful summaries of contemporary anti-discrimination legislation are available on the website of the federal Human Rights and Equal Opportunity Commission, [http://www.humanrights.gov.au/info\\_for\\_employers/law/index.html#hreoca](http://www.humanrights.gov.au/info_for_employers/law/index.html#hreoca) accessed 10 November 2009. The 1980s also saw widespread reforms in areas such as sexual assault law. For a discussion, see Mason Gail 'Reforming the Law of Rape: Incursions into the Masculinist Sanctum' in Kirkby Diane (ed) *Sex Power and Justice: Historical Perspectives of Law in Australia* Oxford University Press Melbourne p 50.

<sup>22</sup> Eisenstein Hester *Inside Agitators: Australian Femocrats and the State* Temple University Press Philadelphia 1996.

<sup>23</sup> Genovese Ann 'Poisons and Antidotes: Historicising feminism and equality in an age of rights competition' (2008) 27 (3) *Dialogue* 10 at 16.

<sup>24</sup> Brownmiller Susan *In Our Time: Memoir of a Revolution* Aurum Press London 1999 p 217.



a radical vision. As she writes, any sacrifice was balanced by ‘achievement on the “equality as justice for women” front, that we can still access today, albeit in much watered down ways: the homemaker contribution provisions in the *Family Law Act*, domestic violence legislation at state level and the *Sex Discrimination Act*.’<sup>25</sup>

In important ways however, Australian feminism was still influenced by the attachment to a wounded subjectivity which requires protection from the state. In Australia, as elsewhere, one of the biggest forces in changing feminists’ relationship to the state was the discovery of an epidemic of sexual assault, and the subsequent focus on sex as a site of danger. This meant that feminists found themselves in the position of arguing for stricter sentencing and law enforcement measures in relation to sexual violence, a particularly marked shift for a movement that had largely emerged out of the New Left influenced anti-Vietnam war and civil rights movement in both Australia and the US. This meant that at its inception women’s liberation movements tended to have a politics of distrust of law enforcement, and the police particularly. As Susan Brownmiller, one of the founding feminist theorists of rape, remarks in her autobiography, ‘people forget what a sharp attitudinal reversal these legislative reforms [around sexual violence] signified.’<sup>26</sup> This shift, of necessity, moved away from a simple analysis of the state as a site of domination in its focus on making the instruments of the state — the law and courts — work for victims.

The tension in relation to the state reflected a deeper antagonism between the determination to enhance and celebrate women’s sexuality and the need to address the endemic nature of sexual violence. In the 1970s, feminists challenged normative practices of heterosexuality in writings such as Anne Koedt’s ‘Myth of the Vaginal Orgasm’, while the political dimensions of women’s (hetero)sexuality were rethought by writers such as Adrienne Rich in her influential article, ‘Compulsory Heterosexuality and Lesbian Existence’.<sup>27</sup> At the same time the entrenched and structural nature of sexual violence was exposed by activists such as Brownmiller, who declared in *Against Our Will: Men, Women and Rape* that ‘rape is a conscious process of intimidation by which *all* men keep *all* women in a state of fear’.<sup>28</sup> By the 1980s, this antagonism had come to the fore in the US particularly in the conflict between radical feminists such as Brownmiller, and self-described ‘sex positive’ feminists.<sup>29</sup> The focus by feminists concerned with sexual violence on achieving legislative reforms has meant that their positions have gradually become the mainstream of public feminist discourse.<sup>30</sup> A particularly pivotal

<sup>25</sup> As above at 16.

<sup>26</sup> Brownmiller as above at 24.

<sup>27</sup> Koedt Anne ‘Myth of the Vaginal Orgasm’ 1970. Accessed at Chicago Women’s Liberation Union Herstory Project <http://www.cwluherstory.org/myth-of-the-vaginal-orgasm-2.html> (date accessed 05/09/09); Rich Adrienne ‘Compulsory Heterosexuality and Lesbian Existence’ in *Blood, Bread, and Poetry* Norton New York 1994(1980).

<sup>28</sup> Brownmiller Susan *Against Our Will: Men, Women and Rape* Simon & Schuster New York 1975 p 115. Emphasis in original.

<sup>29</sup> For an overview of this conflict, see Duggan Lisa and Hunter Nan *Sex Wars: Sexual Dissent and Popular Culture* Routledge New York 1995.

<sup>30</sup> An interesting statement of this position is made by Elisa Glick who argues that it is precisely the failure of ‘pro-sex’ feminist and queer theorists to move beyond identitarian cultural politics that has ceded the public definition of feminism

moment in this shift was the emergence in the mid-1980s of 'date' or 'acquaintance' rape as a central issue for feminists. Particularly influential in this regard was the 1985 *Ms* magazine survey authored by Mary Koss, which produced the still-cited statistic that one-in-four American women would be a victim of rape or attempted rape in their lifetime.<sup>31</sup> The logical consequence of this epidemic of violence within normative sexual encounters was the impossibility of drawing an absolute boundary between sex and sexual assault, leading many feminists to characterise sex itself as inherently threatening for women.

Critiques of the violence inherent in what has historically been constructed as 'normal' or acceptable sexual relationships and practices have been amongst the most significant contributions made by second wave feminism. Given this, there are, however, problematic aspects to dominant feminist analyses of date and acquaintance rape. In the famous *Ms* magazine study, for instance, 73% of the women categorised by Koss as having experiences which met the legal definition of rape did not classify their own experiences as such.<sup>32</sup> While feminists point to the frequent 'split reality' between men and women's perceptions of sexual encounters, many women do not concur with feminist definitions of them as victims of sexual violence.<sup>33</sup> Thus, feminists may find themselves in the fraught position of attempting to convince women that, in the words of Sandra Bartky, 'feminist consciousness is consciousness of *victimization*', and that the outcome of this consciousness is to 'come to see oneself as a victim'.<sup>34</sup> The problem with this logic is that it leads feminists to construct sexuality as a constant crisis, and one that cannot be overcome. To conceive of women's sexuality solely in terms of victimisation leads almost inevitably, as Wendy Brown has argued, to increased calls for state regulation, with little or no critical attention paid to the role of law and state power in producing and reproducing the very conditions that make rape not only possible but ubiquitous.

The response of lesbian and gay movements to the AIDS epidemic has a different affective history, although it leads to some strikingly similar outcomes. In uncovering the hidden epidemic of rape, feminists argued that women had been wrongly kept silent and ashamed for too long. They forced an unwilling public to reckon with the realities of what reducing sex to a private act actually meant in reality — a lack of sexual pleasure for women and the prospect of sexual violence. The sudden advent of AIDS, however, in a climate of an emerging discussion of non-heterosexual sexualities, further stigmatised these as unhealthy and shameful. In this context,

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to the 'radical feminist' side of debates. Glick Elisa 'Sex Positive: Feminism, Queer Theory, and the Politics of Transgression' (2000) 64 *Feminist Review* 19 at 30–32.

<sup>31</sup> The survey results were later compiled into a monograph by Robyn Warshaw, where they were presented with additional information about date and acquaintance rape. Warshaw Robyn *I Never Called it Rape* Harper & Collins New York 1988.

<sup>32</sup> Of this 73 percent, 49 percent described the incident as 'miscommunication', 14 percent said it was a 'crime but not rape' and 11 percent said they 'don't feel victimised.' Koss Mary Dinero Thomas and Seibel Cynthia 'Stranger and Acquaintance Rape' (1988) 12 *Psychology of Women Quarterly* at 12. The issue of what have come to be known as 'unacknowledged rape victims' continues to be controversial within research in the area. For an overview of the debates see Gavey Nicole *Just Sex? The Cultural Scaffolding of Rape* Routledge London and New York 2005 pp 169–194.

<sup>33</sup> The phrase 'split reality' is from MacKinnon Catherine *Toward a Feminist Theory of the State* Harvard University Press Cambridge 1989 p 180.

<sup>34</sup> Bartky Sandra *Femininity and Domination: Studies in the Phenomenology of Oppression* Routledge New York 1990 p 15. Emphasis in original.

writers such as Judith Butler have argued, it is unsurprising that the lesbian and gay movement would look to the state for recognition and legitimation.<sup>35</sup> For Butler, the move to state recognition, and particularly the contemporary push for gay marriage

is in some ways a response to AIDS, a shamed response in which a gay community seeks to disavow its so-called promiscuity, one in which gay people appear as healthy, normal, and capable of sustaining monogamous relations.<sup>36</sup>

The conservatism of contemporary marriage campaigns can be seen, argues Butler, in the reliance of same-sex marriage discourse on 'profound and abiding investments not only in the heterosexual couple but also in the question of what forms of relationship ought to be legitimated by the state'.<sup>37</sup> Butler sees these investments as tied to an explicit abandonment of the revolutionary ideal of earlier activism.

In the same way that feminist politics have become attached to an identity constituted by potential and actual violence, so contemporary gay politics have become attached to an identity based on the injury of exclusion. This leads along the same trajectory to a politics of *ressentiment* and powerlessness, calling for redress through the codification of recognition and a corresponding dependency on the state for legitimation. As Judith Butler writes:

To be legitimated by the state is to enter into the terms of legitimation offered there and find that one's public and recognizable sense of personhood is fundamentally dependent on the lexicon of that legitimation. Moreover, it follows that the delimitation of legitimation will take place only through an exclusion of a certain sort although not a patently dialectal one. The sphere of legitimate intimate alliance is established through producing and intensifying regions of illegitimacy.<sup>38</sup>

Reliance on state legitimation to overcome exclusion is premised therefore on the reproduction of zones of exclusion. Lesbians and gays who accept the institution of monogamous marriage may be able to step into a region of legitimacy. However, this comes at the cost of intensifying the political and social exclusion of those who still seek to form a different future based on different kinds of relationships and different models of sexuality.

This has a number of consequences, the first and most obvious being the legitimation of marriage as the most, or even only, legitimate model of sexual relationships, and a consequent policing of those who are seen to threaten that institution. As Wendy Brown comments in her discussion of the gay marriage campaign, there is 'no room to cast doubt or aspersion on the value or the meaning of the right being fought for'.<sup>39</sup> This not only makes 'unspeakable' the

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<sup>35</sup> Butler Judith 'Is Kinship Always Already Heterosexual?' in Scott Joan W. and Keates Debra (eds.) *Going Public: Feminism and the Shifting Boundaries of the Private Sphere* University of Illinois Press Urbana and Champaign 2004 p 123 at 134.

<sup>36</sup> As above.

<sup>37</sup> As above at 126.

<sup>38</sup> As above.

<sup>39</sup> Brown Wendy 'Untimeliness and Punctuality: Critical Theory in Dark Times' in *Edgework: Critical Essays on Knowledge and Politics* Princeton University Press Princeton NJ 2005, p 3-4.

'suggestion that gays and lesbians promulgating marriage as the ultimate sanctification of love between two people were biting from the same mythohistorical muffin as anti-gay conservatives declaring marriage to be timeless and transcendent in meaning'.<sup>40</sup> It also casts into the realms of illegitimacy and exclusion those who can't or won't lead the kind of life that is enforced by the institution of monogamous marriage. As Brown notes:

It is therefore hardly surprising that when a threesome unsuccessfully sought a marriage license from San Francisco city officials, they were jeered by their fellow queers: "You're ruining it for all of us," yelled the wedding-besotted crowd as the triplet of sexual deviants walked away from the courthouse.<sup>41</sup>

What is particularly disturbing about this example is not merely the shift in identity of those who were so recently excluded to active agents of exclusion. Also, it is the patent precariousness of the social legitimacy of those same people jeering outside the courthouse. The ongoing gains and losses of the same-sex marriage campaign are made sources of exultation and trauma respectively because subject-identity and subjectification has become tied so heavily to state recognition. As Butler argues:

Failure to secure state recognition for one's intimate arrangements can only be experienced as a form of derealization if the terms of state legitimation maintain hegemonic control over the norms of recognition — in other words, if the state monopolizes the resources of recognition.<sup>42</sup>

In participating in, rather than challenging this monopolisation, the lesbian and gay movement sacrifices its ability to engage in practices of self-realisation.

In gay/lesbian/queer politics, there were also significant differences between the US and Australia, made most prominent in the politics of AIDS, despite an early impulse of Australian governments to turn to the USA for guidance.<sup>43</sup> As Paul Sendziuk has pointed out in his discussion of the history of AIDS activism in Australia, while the early years of AIDS saw suspicion and hostility directed towards homosexuals, by and large, and certainly in comparison with the US

[t]he expected backlash against homosexuality did not occur...as Australian State and Commonwealth governments — with the exception of the conservative states of Queensland and Tasmania — deviated from the American model and chose to incorporate representatives of the communities most affected by AIDS into a partnership with government and medical experts. They did so in order to gain their expertise in communicating with, and educating, people at risk. The result was an approach to AIDS prevention that stressed the need for community participation in education rather than the

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<sup>40</sup> As above at 3.

<sup>41</sup> As above at 4.

<sup>42</sup> Butler above note 35 at 134.

<sup>43</sup> Sendziuk Paul *Learning to trust: Australian responses to AIDS* Sydney UNSW Press 2003, p. 3

identification of infected individuals through widespread testing and the curtailment of their activities through coercive laws.<sup>44</sup>

Sendziuk goes on to argue that the reasons for the widespread success of the early AIDS response in Australia, was that politicians, doctors and the public 'came to consider gay men, prostitutes and injecting drug users as they and their supporters imagined themselves: trustworthy'.<sup>45</sup>

The Australian state's very early involvement in AIDS prevention and incorporation of gay and lesbian activists into the very structures of its response therefore resulted in a different community relationship to the state — one of cooperation and integration, which in important ways mirrored the earlier incorporation of feminists, although it has not occurred to the same extent. This process has carried through in later decades into other areas, including the focus of the various state gay and lesbian rights lobbies on developing same-sex relationship recognition through individual state legislation, based on earlier recognition of opposite-sex *de facto* relationships. Systems for registering civil unions also exist in several states, territories and local jurisdictions. 'This stands in contrast to the situation in the US, where in many states *de facto* opposite-sex relationships remain as unrecognised as same-sex relationships, explaining the strong American focus on marriage, and the different trajectories of the demands for same-sex marriage in the two countries, particularly in the early years of these campaigns. Similarly, the various state health departments have continued to support health education catered to queer communities, tourism and event support agencies fund community activities such as the Sydney Lesbian and Gay Mardi Gras, and (limited) anti-discrimination legislation has been adopted federally, and in all states and territories. These strong state-community interactions have also provided career paths for many gay and lesbian community leaders, again echoing the earlier creation of an Australian 'femocracy'. One could say therefore that for queer communities in Australia, relations to the state are considerably more complex than in the United States, where Brown's processes of *ressentiment* and exclusion are more clearly in play.

These differences have also led to divergences in queer politics in Australia and the US. One example is the way in which the politics of US activist group ACT-UP were adapted to the Australian context. Michael Connors has argued that the radical push of ACT-UP Australia, and particularly its 1991 D-Day campaign — a coordinated national series of actions to highlight government inaction — existed in part to support those already incorporated within government reform processes. Adam Carr described this as acting 'like a bunch of loonies who would then make other AIDS groups appear eminently reasonable'. Connors clarifies that ACT UP did exist independently of existing AIDS groups.<sup>46</sup> However, he notes that Carr's comments are indicative of the ways in which ACT UP's direct action was tied to the policy process, and aimed at

<sup>44</sup> As above at 4.

<sup>45</sup> As above at 5.

<sup>46</sup> Connors Michael 'Acting Up: AIDS and the Politics of Direct Action' in Willett Graham (ed.) *Thinking Down Under: Australian Politics, Society and Culture in Transition* Wissenschaftlicher Verlag (Scientific Publishing House) Trier 2006 text available at Sovereign Myth Blog, url: <http://sovereignmyth.blogspot.com/2008/07/test.html> (Accessed: 24 November 2009).

supporting AIDS activists working inside the government.<sup>47</sup> In Carr's comments, we can see the complete subsumption of radical political activism to the state, and those working with it. External movements in this model act primarily to pressure reformist change, with those already included acting to facilitate such change.

It is clear however that it is insufficient to simply condemn the directions that feminist and queer movements have taken in response to the crises of sexuality. Both the AIDS epidemic and the epidemic of sexual violence have had real effects, and have activated genuine desires for state recompense and protection. The responses to these crises with law, have however, had a series of consequences that we believe undermine the political effectiveness and potential of these movements. In particular, through adopting a response to crisis that privileges appeals to the state on the basis of subjective wounding, queer and feminist movements have abandoned their revolutionary horizon and their sense of sex and gender relations as *needing* to be brought into crisis. Rather, in seeking to contain crisis, feminist and queer movements have come to mirror the regulatory policies of government. In the following sections, we trace this loss of a revolutionary horizon, and argue that the adoption of a normalising response to crisis, even the crises of AIDS and sexual violence, is ultimately self-defeating.

## 2.0 THE EFFECTS OF CRISIS: THE LOSS OF A REVOLUTIONARY HORIZON

We are women and men who, from the time of our earliest memories, have been in revolt against the sex-role structure and nuclear family structure. The roles we have played amongst ourselves, the self-deceit, the compromises and the subterfuges — these have never totally obscured the fact that we exist outside the traditional structure — and our existence threatens it.

Martha Shelley, 1970<sup>48</sup>

We are getting married and we are producing and raising children and the government is using every trick in the book in an attempt to make it go away. We will not go away.

Gay marriage is out there. It is happening. The revolution has arrived and it is about to get a lot noisier.

Kerryn Phelps, 2005<sup>49</sup>

The disjuncture between Gay Liberation Front activist Martha Shelley's famous words of rebellion in 1970 and the proclamation of Professor Kerryn Phelps' 'revolution' in 2005 reflect a

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<sup>47</sup> As above.

<sup>48</sup> Shelley Martha "Gay Is Good" *Rat* 24 February 1970.

<sup>49</sup> Phelps Kerryn 'Speech by Professor Kerryn Phelps to the Sydney Relationship Equality Rally' National Day of Action for Equal Marriage Rights 13 August 2005 available via Australian Marriage Equality website, [http://www.australianmarriageequality.com/Kerryn\\_Phelps'\\_Speech.doc](http://www.australianmarriageequality.com/Kerryn_Phelps'_Speech.doc) accessed on 25 August 2009.

fundamental shift in the perception of the relationship between sexuality, the law and the state.<sup>50</sup> Specifically, it represents a re-conceptualisation of what a 'revolutionary' movement around sexuality might be. This re-conceptualisation can be seen most simply as a shift away from a direct challenge, antagonistic to the dominant sexual and social order. In its place is a conception of sexual politics in which feminist and queer demands can and should be accommodated within the dominant structure, and where the primary vehicle for delivering them is the state itself. Shelley's position derived from the Gay Liberation Front's assertion 'that complete sexual liberation for *all* people cannot come about unless existing social institutions are abolished'.<sup>51</sup> In contrast, for Phelps the gay revolution is to be found in the fact that homosexuals are already 'getting married' and 'producing and raising children'. In other words, the liberation of lesbians and gays occurs through their inclusion within the very institutions whose abolition the Gay Liberation Front sought. In essence, the 'liberatory' desires of sexual politics have been largely devolved into a process of inclusion and the place of 'crisis' as something brought on by movements, rather than resisted by them has been lost.

While lesbians and gays initially spoke from a position of social and political exclusion, heterosexual women were fighting against their almost complete subsumption within these hegemonic models and institutions. The founding moment of the second wave feminist movement is often located in the publication of Betty Freidan's *The Feminine Mystique*, which railed against the sacrifice of women's subjectivity that existed at the centre of the nuclear family and married heterosexual couple.<sup>52</sup> In the 1970s, as discussed above, sex came even more to the fore, with the dual focus on women's sexuality and the danger of sexual violence. In this early period, radical feminism was driven by two utopian sexual visions — that of a world free of sexual violence and a world in which women could reclaim and re-imagine their sexuality. From the beginning, however, feminists struggled to embrace both a revolutionary re-imagining of women's sexuality and an analysis of the destructive force that sexual violence has had in the lives of many women. The identification of sexuality as a realm of *both* 'pleasure and danger', to quote the title of one influential 1980s collection on the subject, has historically proved a difficult balance to maintain.<sup>53</sup> In the 'sex wars' of the 1980s, following the (in)famous Barnard conference on sexuality of 1982, feminism split into two opposed camps — those in the anti-violence movements who saw sex as almost solely a realm of danger and trauma, and the 'pro-sex' movements who often portrayed sex as in itself a revolutionary or radical practice.

The conflict of the 1980s demonstrated that one 1970s shortcut to utopia was not only impractical but insufficient. Lesbian feminist movements of the 1970s had been able to resolve feminism's contradictory understanding of sexuality by essentialising and gendering it. Men were

<sup>50</sup> *Marriage Legislation Amendment Bill 2004* (Cth).

<sup>51</sup> Reproduced in D'Emilio John *Sexual Politics, Sexual Communities* University of Chicago Press Chicago Press 1998(1983) p. 234. Emphasis added.

<sup>52</sup> Freidan Betty *The Feminine Mystique* Norton New York 2001. Originally published in 1963.

<sup>53</sup> Vance Carol S. (ed) *Pleasure and Danger: Exploring Female Sexuality* Routledge & Kegan Paul Boston Mass. London and Melbourne 1984.

seen to be inherently violent and women automatically violated and degraded in sexual relationships with them.

On the other side, lesbian relationships were idealised as not only inherently radical but also an inherently equal and liberating model of sexuality. The feminism of the 1970s therefore found its utopia in a vision of a world without men, an image that has inspired women as diverse as Valerie Solanas and Shere Hite.<sup>54</sup> By identifying the danger of sex with men and the pleasure with women, the 1970s vision of lesbian women-only utopias seemed to solve the problem of sex. However, as the sex wars of the 1980s would make clear, the feminist crisis of desire was not so easy to solve. The problem was simply that many women rejected the 'liberated' and utopian model of sexuality offered by lesbian feminism. By the 1980s, many vocal critics were arguing that in attempting to define the danger out of lesbian sexuality, feminists had desexualised lesbians. Additionally, women began to speak about the large-scale policing of desire and sexual practices that went on in lesbian feminist communities.<sup>55</sup> Lesbian feminists were said to have drafted a whole set of rules of acceptable and unacceptable lesbian sexual conduct. Practices such as penetration were seen to be either aping male behaviours or conforming to male fantasies. By identifying these practices as 'male-identified' they were defined out of the woman-centred model of sexuality. With the sex wars of the 1980s, when women began to talk not only of penetrative sex, but of enjoying pornography and sado-masochism and identifying as butch and femme, and even proudly embracing heterosexuality, the image of a utopia based merely on an absence of men dissolved and no other revolutionary imagining of sexual transformation has emerged from within feminism.<sup>56</sup> The central ideas of an overthrowing of gender and the creation of a society in which sex and desire look radically different from their current manifestations are markedly absent from contemporary feminist politics.

Early gay liberationists saw their politics as also being about such a radical overthrowing of sexual structures and gender roles, as demonstrated in the Martha Shelley quote above. Dennis Altman's famous book *Homosexual: Oppression and Liberation* outlined Gay Liberation's particular fusion of a radical critique of capitalism and a demand for the 'end of the homosexual' (as Altman's final chapter was titled). In his book, Altman highlighted the liberatory desire for 'polymorphously perverse' sexualities, which would eradicate sexual categorisation and ultimately lead to the elimination of gender as well.<sup>57</sup> This utopian ideal began to whittle away with the

<sup>54</sup> Solanas was a radical feminist activist and writer known for her SCUM Manifesto (1968), in which she argued for the gendercide of men. She also attempted to assassinate Andy Warhol the same year. Hite is a feminist sex educator whose work demonstrated that orgasm is achieved more easily for most women via clitoral stimulation, rather than through vaginal penetration. The utopian imagining of a world without men has also led to a specifically feminist version of 'technoutopia' based on reproductive technologies and test-tube babies.

<sup>55</sup> Allison Dorothy 'Puritans, Perverts, and Feminists' in Allison Dorothy *Skin: Talking About Sex, Class and Literature* Firebrand Books New York 2005 pp 93–100.

<sup>56</sup> It can certainly be argued, as one of our reviewers helpfully pointed out, that the emergence of queer theory may provide one example of such a revolutionary politics of sexuality emerging from within feminism. The reviewer also pointed to radical pro-sex feminist publications such as *Wicked Women*, a regular journal published in Australia during the 1980s and 1990s. While we certainly agree that queer theory has made significant theoretical interventions, its capacity to translate this into a revolutionary political strategy is less clear.

<sup>57</sup> Altman Dennis *Homosexual: Oppression and Liberation* London Penguin 1974.



decline of the Gay Liberation Front and the uneven and changing queer relationship to the law over the 1970s. It ultimately became entirely marginal with the onset of the AIDS crisis in the 1980s, when earlier trends towards defining a coherent community of gay men, and to a lesser extent lesbians, became a political imperative in responding to illness, fear and the need to engage with the state. As this turn to the state that we outline above advanced, the earlier utopian ideal of a permanently changed sexual system for *all* disappeared.

A second crisis in the 1980s also led to a reconceptualisation of queer relations to the law. This came with the arrival of mass panic around child sexuality. Since the early days of Gay Liberation, unequal age of consent laws, even their very existence, have been subject to criticism and debate. For many early Gay Liberationists, state intervention into child sexuality was purely a means of typecasting gays as predators, and for clamping down on adolescent explorations of sexuality. Liberationists argued that there was therefore a need to remove the state's power to intervene in sexual relations, rather than shore it up with laws that arbitrarily penalised sex on the basis of age. With the arrival, however, of the moral panic around paedophilia in the 1980s (that corresponded with the feminist exposure of the epidemic of sexual assault), these early probings of complex intersections of sex, age and power were sidelined and marginalised.<sup>58</sup> This was to become an important moment in the mainstream adoption of 'sex as crisis' discourses, as indicated by our opening discussion. In particular, as Steven Angelides has pointed out in his recent work on paedophilia and homosexuality, the figure of the child came to stand in for a generalised sexual vulnerability, and is therefore a key site for the playing out of contemporary fears around sex, violence and sexuality.<sup>59</sup>

An early precursor to this discursive shift can be found in a conversation between Michel Foucault, Guy Hocquenghem and journalist Jean Danet, held on April 4, 1978.<sup>60</sup> In a discussion about their failed attempt to eradicate French age of consent laws, Foucault makes the perceptive comment that a new form of penal and legislative system was emerging not only in France but in the USA and elsewhere. This new system emerged as a result of the disintegration of earlier legal prohibitions against various ill-defined indecent acts (contraventions of, in French, *pudeur*). The function of this new system, which according to Foucault was necessary as concepts of decency became attached to certain particular cultures and values, 'is not so much to punish offences against these general laws concerning decency, as to protect populations and parts of populations regarded as particularly vulnerable'.<sup>61</sup> This was a profound change from earlier restrictions

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<sup>58</sup> 1972 Gay Rights Platform (provision State-7) National Coalition of Gay Organizations Convention Chicago 1972. See also the discussion of conflicts between the left and reformists within gay movements in Australia in Willett Graham *Living out Loud: A History of Gay and Lesbian Activism in Australia* Allen & Unwin St Leonards 2000 at 154. Similar debates also occurred elsewhere, such as in Canada. See Warner Tom *Never Going Back: A History of Queer Activism in Canada* University of Toronto Press Toronto 2002 at 119.

<sup>59</sup> See for example, Angelides Steven 'The Emergence of the Paedophile in the Late Twentieth Century' (2005) 126 *Australian Historical Studies* 274; and Angelides Steven 'Feminism, Child Sexual Abuse and the Erasure of Child Sexuality' (2004) 10 2 *GLQ: A Journal of Lesbian and Gay Studies* 141

<sup>60</sup> Foucault Michel 'Sexuality, Morality and the Law' Sheridan Alan (trans.) in Kritzman Lawrence D. *Michel Foucault: Politics Philosophy Culture: Interviews and other writings* Routledge New York 1988 p 271.

<sup>61</sup> As above at 276.

however, and, like those earlier laws, had a disproportionate effect on queer people and a lasting impact on perceptions of sexuality. Perversely this shift came as a result of the successes of the earlier gay campaigns' exposure and reform of disproportionately applied legal strictures on indecency. The cost of the success in changing normative models of 'decency', to the extent that these changes themselves come to be part of normative attitudes, is the foreclosing of the possibility of a radical break.

For Foucault, the construction of, on one side, a 'fragile' population and, on the other, a 'dangerous' one is based on a double psychiatric/psychological intervention into sexuality (an acceptance of diverse sexualities alongside a distinction of certain sexualities, most notably those of children, as distinct and separate from the sexualities of adults), resulting in a need for the intervention of the law as protection from (adult) desire:

We're going to have a society of dangers, with, on the one side, those who are in danger, and on the other, those who are dangerous. And sexuality will no longer be a kind of behavior hedged in by precise prohibitions, but a kind of roaming danger, a sort of omnipresent phantom, a phantom that will be played out between men and women, children and adults, and possibly between adults themselves, etc. Sexuality will become a threat in all social relations, in all relations between members of different age groups, in all relations between individuals. It is on this shadow, this phantom, this fear that the authorities would try to get a grip through an apparently generous and, at least general, legislation and through a series of particular interventions that would probably be made by the legal institutions, with the support of the medical institutions.<sup>62</sup>

Foucault in many ways predicts the processes we have charted above. As seen in comments such as those of Kevin Rudd and Stephen Conroy, the danger of sex is no longer the private sexualities or individual acts of society's members, which are largely legal and tolerated, but this very phantom danger that intervenes in all social relations, marking sex as a threat and opening up the space for further legal intervention into the sexual lives of us all.

In contemporary Australia then, a dual process is occurring that has dramatically altered the underlying assumptions about the interactions between feminist and queer politics, the Australian state and its law. On the one hand, there is a broad-based perception of a crisis in normative sexuality, captured in John Howard's simple homophobia, and the broader Howard/Rudd panic around child sexuality and pornography. This broad-based 'roaming danger' has come over the course of the Howard and Rudd governments to be understood as a threat to social relations and requiring of state intervention across many more aspects of our sexual lives. On the other hand, the turn to the state and to law by those that have historically provided the point of critique that has so fundamentally changed attitudes to gender and sexuality has resulted in the inability to mount a sustained critique at moments when the 'roaming danger' of sex comes into particular relief. Witness the Henson debate with which we opened this article. We have discussed elsewhere the Left's failure in this instance to mount any meaningful critique that did

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<sup>62</sup> As above at 281.

not rely on liberal or conservative demands.<sup>63</sup> However, we argue that this is not a simple one-off failure, but a reflection of a broader problem in feminist and queer politics. With the consolidation of the state and law as both protector of identity and protector from harm, the possibility of critique is foreclosed. Ultimately, queer and feminist critique comes to be framed as antagonistic to the desires of the very communities it emerges from.

This antagonism can be seen most clearly in the use of regulatory and control mechanisms by members of these communities themselves, as was demonstrated in Wendy Brown's example of the threesome seeking marriage. An important instance of this process can be seen in queer and feminist uses of anti-discrimination legislation. Originally conceived as a necessary and important means of breaking with historic workplace and social discrimination against women, queers and other minorities, in recent years this has become a method to enforce exclusion of others by those very groups. Of particular note is the case surrounding a recent exemption from the Victorian *Equal Opportunity Act* (1995) provided to the Peel Hotel, a Melbourne pub and nightclub, which permits that establishment

to refuse or restrict entry to [the venue] to people who do not identify as homosexual males where to allow entry or unrestricted entry would, in the opinion of the applicant, its agent or employee, adversely affect the safety or comfort of the venue for its homosexual male patrons, or the nature of that venue as a venue primarily for homosexual male patrons; and to advertise those matters.<sup>64</sup>

This exemption follows earlier exemptions provided to a women-only gym, a gay dance party promoter, gay sex-on-premises venues, student associations and others, and is justified by the need to maintain exclusions between different sexes and sexualities.<sup>65</sup> The Peel's owner Tom McFeely was quoted at the time as saying that the step was necessary to 'protect the integrity of the venue and to ensure the safety and comfort of my regular gay clientele.'<sup>66</sup> Victorian Civil and Administrative Tribunal Deputy President Cate McKenzie justified the granting of an exemption to the Act based partially on fears that

if heterosexual men and women and lesbians come to the venue in large groups, then their numbers may be enough to "swamp" the numbers of gay male patrons. This would

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<sup>63</sup> Serisier Tanya and Pendleton Mark 'The Disappearance of Desire' (2008) 193 *Overland* 48

<sup>64</sup> Peel Hotel Pty Ltd (Anti Discrimination Exemption) [2007] Victorian Civil and Administrative Tribunal 916 (24 May 2007). This material was originally researched for an article to be co-written with Dan Vaughan. That never eventuated but our thoughts on this section and the article more broadly were greatly shaped by those discussions.

<sup>65</sup> See for example, Equal Opportunity Board Melbourne NO. 22 OF 1994 Applicant to revoke an exemption under section 40(3) of the Equal Opportunity Act 1984; Netkey Pty Ltd (exemption) [2003] VCAT 2007 (15 December 2003); and Deakin University Student Association Inc (Exemption) (Anti Discrimination) [2006] VCAT 11 (2 February 2006).

<sup>66</sup> Miletic Daniella 'Straight-out ban at gay venues sparks uproar' *The Age* (Melbourne) 29 May 2007 <http://www.theage.com.au/news/national/straightout-ban-at-gay-venues-sparks-uproar/2007/05/28/1180205160437.html> accessed on 9 September 2009.

undermine or destroy the atmosphere which the company wishes to create.<sup>67</sup>

McFeely was faced with numerous queries about exactly how he could determine the sexuality of his (male) clientele at the door, with his response being simply, 'with experience you can tell'.<sup>68</sup> Whatever one thinks of this particular business' right to discriminate or choose its own clientele, the response to the perceived crisis of 'swamping' of gay spaces relies on the blunt instruments of the state and the law, and the reinforcement of a rigid definition of the male homosexual subject, as defined, in this instance, by McFeely. That this example demonstrates not only this legal reliance, but also a commitment to inflexible and (to the 'experienced' eye) externally observable markers of (homo)sexuality is disturbing, as is the further distinction made between ostensibly male 'homosexuals' and women, explicitly lesbians. The process of exclusion therefore is not simply about freedom from dominant heterosexuality, but also enables the space of male homosexual sociality to be defined as one which by necessity excludes women, resulting in the structural reinforcement of misogyny in gay male space. When access to public and commercial spaces is considered in relation to economic and social power, it is clear that the Peel's exemption will impact most heavily not on heterosexual men and women but precisely on lesbians, and even more so on trans and other non-normative gender identities. The very mechanisms that were created out of a desire to expand access and limit damage have, with a narrative of crisis and through the processes we have described above, facilitated the reverse — state support and legal justification for limiting sexual and gender expression.

### 3.0 BEYOND THE DESIRE FOR LAW

The strategy of calling on the state for protection and recognition clearly has its benefits. Anti-discrimination legislation has worked to reduce discriminatory practices in workplaces and society more broadly. The feminist anti-rape movement has also demonstrated that real reforms and benefits can be won, particularly in the criminal justice system. However, the feminist example demonstrates that the strategy of legal reform is limited in the change that it can produce. While laws and policies surrounding police and court practices for dealing with sexual assault complainants have been transformed, their impact at the level of legal *practice* has been repeatedly questioned.<sup>69</sup> The primary peril, however, for feminist reform efforts may be that the anti-rape movement has ceased contesting law's power to define and judge women's lives, instead shifting to implicitly supporting and legitimating the power of law. As feminist criminologist and

<sup>67</sup> Peel Hotel Pty Ltd (Anti Discrimination Exemption) [2007] Victorian Civil and Administrative Tribunal 916 (24 May 2007).

<sup>68</sup> Miletic above note 65.

<sup>69</sup> For a comprehensive review of legal changes in NSW, as well as a sobering assessment of their impact on victims' experiences of the legal system, see Department for Women (NSW) *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* (1996). For a thoughtful discussion of the problems of rape law reform see Heath Mary and Naffine Ngaire 'Men's Needs and Women's Desires: Feminist Dilemmas about Rape Law Reform' (1994) 3 *Australian Feminist Law Journal* 30.

legal theorist Carol Smart has argued, the main effect of attempts to use the law to protect women is to empower the law itself and extend its imperialist reach.<sup>70</sup> In the case of rape particularly, this exacerbates a circular logic that rape can only be feared and legally redressed rather than fought by women themselves. The law and legal deterrence is ultimately about the state persuading men not to rape. For women to base politics on an appeal to the state is to concede this power to men.<sup>71</sup> It does not envision in any way removing this power from men's hands, nor does it consider that it may be possible to attempt to stop rape ourselves, rather than 'to have our raped selves vindicated in court.'<sup>72</sup> Similarly, queer reliance on anti-discrimination law abandons any real belief in transformative social change. Instead, it bolsters a narrowly defined set of sexual and gender identities that the state says it can protect through disciplining both offenders against these identities and those that step outside of their bounds. In the words of Wendy Brown, it is perhaps the successes as much as the failures of feminist and queer reform efforts that have dissuaded us from considering 'the perils of pursuing emancipatory political aims within largely repressive, regulatory, and depoliticising institutions that themselves carry elements of the regime whose subversion is being sought'.<sup>73</sup>

Ultimately, it is with the possibilities for the subversion of the dominant regime of sex and sexuality that we, as theorists and activists, are concerned. In Australia particularly, we argue, queer and feminist movements' implication in the regulation of sex *as* crisis, is intimately tied to their loss of a desire to initiate a crisis *within* dominant modes of sex and sexuality. With this loss has also gone much of their force as movements for transformative change. Dreams of a world liberated from sexual restriction and gender division have disappeared in favour of a turn towards the state, and a call for increasing regulation. In the cases of the Peel Hotel's anti-discrimination exemption, and the same-sex marriage campaigns, we can see the continued failure of feminist and queer politics to move beyond what Wendy Brown has called the 'inceptive self-cancellation' of the instinct for freedom. She writes:

Initial figurations of freedom are inevitably reactionary in the sense of emerging in reaction to perceived injuries or constraints of a regime from within its own terms. Ideals of freedom ordinarily emerge to vanquish their imagined immediate enemies, but in this move they frequently recycle and reinstate rather than transform the terms of domination that generated them. Consider exploited workers who dream of a world in which work has been abolished, blacks who imagine a world without whites, feminists who conjure a world either without men or without sex, or teenagers who fantasize a world without parents.<sup>74</sup>

This process of inversion and negative proscriptions continues, even within more radical elements of these communities, who struggle with simplistic binaries constructed out of a desire

<sup>70</sup> Smart Carol 'The Woman of Legal Discourse' in Daly Kathleen and Maher Lisa (eds) *Criminology at the Crossroads: Feminist Readings in Crime* and Oxford University Press New York 1998 at 22.

<sup>71</sup> Marcus Sharon 'Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention' in Butler Judith and Scott Joan W (eds) *Feminists Theorize the Political* Routledge New York and London 1992 at 398.

<sup>72</sup> As above at 392.

<sup>73</sup> Brown above note 19 at ix-x.

<sup>74</sup> Brown above note 19 at 7

for difference, rather than change. The limitations of the radical visions at the heart of feminist and queer politics, utopias conceived of worlds without men or without the heterosexual couple have found their final expression in a limited and restrictive politics of negation and conformity.

This is why, in probing the potential for a new revolutionary spirit, it is important to avoid uncritically calling for a return to the past. The legitimate feminist demand for an accounting for the epidemic of sexual assault and the unimaginable impact of the epidemic of AIDS combined to shut down a radical imagining and turn the focus of attention to the state. In addition, in a time when other social movements have also faltered, and the great (if not in reality all that good) alternative to capitalism has been lost in the failings of communist states, there is a recognisable and understandable fear of utopian ideas and revolutionary projects. As lamentable as the loss of utopian vision may be, we need to find a way of avowing that loss that may also enable us to see what we have gained. Wendy Brown writes:

If we are without revolutionary possibility today, we are also free of revolution as the paradigm of transformation... On the other hand, avowing our loss allows us to cultivate the memory ... of the utopian imaginary of the revolutionary paradigm and so make that imaginary part of our knowledge for working in the present, not just a lament about the unrevolutionary present.<sup>75</sup>

We must seek to nourish both the remembered imaginary of a utopian impulse, and the freedom of an open future that may help us to move beyond the limitations of political projects that have come before. We consider the most important responses to the contemporary situation to be those that can embrace openness and uncertainty — the necessary crisis at the heart of critique. As the turn to the state forecloses radical alternatives, the radical response should be not to fear crises of sex but to initiate them. In doing so, it may be possible to prompt a further breaking down of normative sexuality and reinscribe a sexual politics of freedom, by which we do not mean a simplistic individual autonomy, or a reactionary liberal selfishness. Instead, we see the radical project as the continued, collective project of liberation — the idea that individual freedom comes only through ‘a project of making a world with others’.<sup>76</sup> This project, as Wendy Brown has commented, means not simply to look to some sort of sharing of power or collective engagement with the powers that condition our lives, but also requires reckoning with the unknowable, the enigmatic, the uncomfortable, without then ceding to a radical libertarian ‘let us all go off with our differences’ as if they were natural and ahistorical.<sup>77</sup>

Ultimately we do not know where such a path will lead. Rather, we think that what is needed is something akin to Marxist critic Slavoj Žižek’s call to ‘repeat’ Lenin. Žižek argues that what is necessary is to recreate Lenin’s ‘leap of faith’ into the unknown, not in the derivative, undergraduate ‘vanguardism’ of capital-L Leninist organisations but in a truly undefined way,

<sup>75</sup> Brown Wendy ‘Feminism Unbound: Feminism, Mourning, Politics’ in Brown Wendy *Edgework: Critical Essays on Knowledge and Politics* Princeton University Press Princeton and Oxford 2005 p 98 at 115

<sup>76</sup> Brown Wendy ‘Learning to Love Again: An Interview with Wendy Brown’ (2006) 6 *Contretemps* at 25 available at [www.usyd.edu.au/contretemps/6january2006/brown.pdf](http://www.usyd.edu.au/contretemps/6january2006/brown.pdf) accessed on 5 September 2009.

<sup>77</sup> As above.

armed with no certainty but the willingness to create an open situation. Žižek concludes his essay on Lenin by asking if we, and by we he specifically includes radical queer and feminist academics, are 'still able to experience the shattering impact of such an authentic historical openness?'<sup>78</sup> For us, this 'shattering impact', as daunting as it may seem, holds far more appeal, and certainly much greater potential for revolutionary change, than the security of attaching ourselves to the state in order to rescue us from sex. ●

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<sup>78</sup> Žižek Slavoj 'Repeating Lenin' 2001 available at [www.lacan.com/replenin](http://www.lacan.com/replenin)